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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-370

CITY OF WEST HAVEN,

Petitioner,

v.

THOMAS TURPIN,

Respondent.

PETITION OF THE CITY OF WEST HAVEN FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND APPENDIX

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PETITION OF THE CITY OF WEST HAVEN FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND APPENDIX

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, the City of West Haven, appellee in the court below, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on June 5, 1978. That decision reversed the partial judgment of the United States District Court for the District of Connecticut entered in the above case on May 17, 1977, and the final judgment of said court entered on August 3, 1977.

OPINIONS BELOW

The unreported opinion of the United States District Court for the District of Connecticut, dated May 9, 1977, dismissing plaintiff's complaint against the City of West Haven, is set forth at page 1a of the Appendix filed herewith. A further unreported opinion of the United States District Court for the District of Connecticut, dated August 1, 1977, ordering that final judgment be entered in favor of the City of West Haven pursuant to Rule 54(b), Federal Rules of Civil Procedure, is set forth at page 1c of the Appendix.

The opinion and judgment of the United States Court of Appeals for the Second Circuit, reversing as to plaintiff's claim under the fourteenth amendment and allowing a cause of action against the City of West Haven founded thereon, are set forth at page 1e of the Appendix and are reported at 46 L.W. 2658.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit, reversing in part, and remanding in part, the decision of the United States District Court for the District of Connecticut was entered on June 5, 1978 (A. 1f). The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Are municipalities subject to liability for money damages in an action implied directly from the fourteenth amendment to the United States Constitution for constitutional violations allegedly committed by their employees?

2. Does the governing body of a municipal police department have a federal constitutional duty to discipline a police officer charged with unconstitutional conduct for the purpose of using such action as a deterrent to possible future unconstitutional conduct by other police officers?

3. Does the allegation that the governing body of a municipal police department failed to discipline one police officer charged with unconstitutional conduct state a cause of action against the municipality for money damages upon allegations of subsequent unconstitutional conduct by other police officers?

4. Does the failure of the governing body of a municipal police department to discipline a police officer charged with unconstitutional conduct create an official policy authorizing, sanctioning, requiring or ratifying said conduct?

5. Are municipalities subject to liability for money damages only where they act affirmatively in creating, implementing or executing a policy statement, ordinance, rule or regulation, or may they be subject to such liability where they fail to act?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The fourteenth amendment provides, in pertinent part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
>
> "Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Title 42, §1983 of the United States Code provides:

> "Every person who, under color of any statute ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

The plaintiff commenced this action in the United States District Court for the District of Connecticut against the individual defendants, Joseph Mailet and John Doe, as police officers employed by the City of West Haven, Connecticut [hereinafter referred to as "the City"], and against the City, for alleged violation of his constitutional rights.

The action against the individual defendants was founded on 42 U.S.C. §1983, with jurisdiction asserted under 28 U.S.C. §1343(3).

The action against the City was founded directly on fourteenth amendment to the United States Constitution, with jurisdiction asserted under 28 U.S.C. §1331. Certain state law claims were also asserted against the City, under 42 U.S.C. §1988, and the pendent jurisdiction of the court.

The plaintiff alleges that he was unlawfully arrested and detained, and was subjected to a malicious prosecution. It is alleged that these actions arose out of animosity toward the plaintiff, on the part of the defendants, flowing from a prior civil action brought by the plaintiff against another member of the Police Department of the City of West Haven.

The plaintiff further claims that the Board of Police Commissioners of the City failed to discipline the officer involved in the prior civil action, and, at some point in time, promoted said officer.

The district court granted the City's Motion to Dismiss all claims against it (A. 1a). The court held that no actionable claim existed against the City under 42 U.S.C. §1983, that no cause of action against the municipality may, or should, be implied under the fourteenth amendment, and declined to exercise pendent jurisdiction over such vaguely stated state law claims as were asserted. On May 17, 1977, a partial judgment was entered in favor of the City.

Pursuant to Rule 54(b), Federal Rules of Civil Procedure, the court, on August 3, 1977, ordered that final judgment be entered in favor of the City (A. 1d).

The plaintiff appealed to the United States Court of Appeals for the Second Circuit. The case was argued to the Court, *en banc*, on January 27, 1978.

In a 5-4 decision, issued on June 5, 1978, the majority of the Court of Appeals reversed the judgment of the district court, insofar as it had dismissed plaintiff's action brought under the fourteenth amendment, and remanded the cause for consideration in accordance with its opinion, as to both the fourteenth amendment cause of action, and the pendent jurisdiction claim (A. 1f).

The dissenting members of the Court of Appeals would have affirmed.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The decision of the Court of Appeals for the Second Circuit in this case, holding that a municipality may be subject to liability for money damages directly under the fourteenth amendment, is in conflict with the decisions of the other Courts of Appeal, in the following cases: *Kostka v. Hogg*, 560 F.2d 37 (1st Cir., 1977), and, *Mahone v. Waddle*, 564 F.2d 1018 (3rd Cir., 1977), *cert. denied*, 98 S.Ct. 3122 (1978).

This Court has not decided the question of whether a municipality may be subject to liability, for money

damages, directly under the fourteenth amendment. *Mt. Healty City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). This important question of federal law has been decided by the Second Circuit, and should be settled by this Court.

The decision of this Court in *Monell v. Department of Social Services of the City of New York*, 98 S.Ct. 2018 (1978) bears upon, but does not resolve, this issue. In light of *Monell*, it appears neither appropriate nor necessary to imply such a cause of action from the fourteenth amendment. A resolution of this question is important to municipalities throughout the United States.

It is noted that the decision of the Second Circuit, in this case, was announced only one day prior to the announcement of the decision by the Court in *Monell*.

This Court has not determined whether the governing body of a municipal police department has a federal constitutional duty to discipline employee officers, and whether failure to do so will subject the municipality to liability directly under the fourteenth amendment.

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT IN THE CIRCUITS AS TO THE IMPOSITION OF LIABILITY FOR MONEY DAMAGES UPON MUNICIPALITIES DIRECTLY UNDER THE FOURTEENTH AMENDMENT.

The decision of the Second Circuit in this case, holding that a municipality is subject to liability

directly under the fourteenth amendment, is in direct conflict with the decision of the First Circuit in *Kostka v. Hogg*, 560 F.2d 37 (1st Cir., 1977) and the decision of the Third Circuit in *Mahone v. Waddle*, 564 F.2d 1018 (3rd Cir., 1977), *cert. denied*, 98 S.Ct. 3122 (1978).

It appears that the Fourth, Fifth, Seventh and Eighth Circuits would, under certain circumstances, be in accord with the Second Circuit.

In its decision in *McDonald v. State of Illinois*, 557 F.2d 596 (7th Cir.,), *cert. denied*, 98 S.Ct. 508 (1977), Seventh Circuit held that implication of a cause of action, for money damages, directly under the fourteenth amendment, on a theory such as that expressed in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), as against a county, based upon the action of one of its employees, on a vicarious liability theory, was neither necessary nor appropriate. Moreover, in that decision, it was noted that no official policy of the county required its employees to deprive citizens of their constitutional rights.

A similar view was expressed in *Jamison v. McCurrie*, 565 F.2d 483 (7th Cir., 1977), where the Court expressed its view that municipal liability could only arise where the actions of its employees were required by some rule, regulation or stated policy.

However, in the decision in *Hostrop v. Board of Junion College District No. 515*, 523 F.2d 569 (7th Cir., 1975), *cert. denied*, 425 963 (1976), the Seventh Circuit permitted recovery against the governmental entity where it found the action of its governing board was directly responsible for the action in question.

In *Owen v. City of Independence*, 560 F.2d 925 (8th Cir., 1977), *cert. denied, vacated and remanded*, 98 S.Ct. 3118 (1978), in an employee discharge-reinstatement with back pay situation, the Eighth Circuit announced a position in accord with the Second Circuit, not only as expressed in the instant case, but also in *Gentile v. Wallen*, 562 F.2d 193 (2nd Cir., 1977).

However, the Eighth Circuit clearly noted that it was taking such action in the context of an equitable remedy only, and left open the question of whether such a remedy would be implied in cases dealing with brutality, false arrest and imprisonment, and unlawful searches and seizures committed by individual police officers. In those situations, some direct involvement by a policy making body of the municipality would apparently be required before liability would be imposed.

Cases stating the views of the Fourth and Fifth Circuits, as to such a fourteenth amendment cause of action, as against municipalities, are *Cox v. Stanton*, 529 F.2d 47 (4th Cir., 1975), and *Reeves v. City of Jackson*, 532 F.2d 491 (5th Cir., 1976).

This issue has also presented difficulty for numerous district courts. Among those determining, prior to the instant decision, that the municipality is not liable, in money damages, directly under the fourteenth amendment are *Crosley v. Davis*, 426 F.Supp 389 (E.D. Pa., 1977); *Mitchell v. Libby*, 409 F.Supp. 1098 (D. Vt., 1976); *Raffety v. Prince George's County*, 423 F.Supp. 1045 (D.Md., 1976); *Farnsworth v. Orem City*, 421 F.Supp. 830 (D. Utah, 1976); *Pitrone v. Mercadante*, 420 F.Supp. 1384 (E.D. Pa., 1976), *rev'd on other grounds*, 572 F.2d 98 (3rd Cir., 1978), *petition*

for cert. filed, 47 U.S.L.W. 3016 (U.S., July 25, 1978) (No. 77-1666); *Turano v. Board of Ed. of Island Trees Union Free School Dist. No. 26*, 411 F.Supp. 205 (E.D. N.Y., 1976); *Gresham v. City of Chicago*, 405 F.Supp. 410 (N.D. Ill., 1975); *Smetanka v. Borough of Ambridge*, 378 F.Supp. 1366 (W.D. Pa., 1974); *Perzanowski v. Salvio*, 369 F.Supp. 223 (D. Conn., 1974); *Weathers v. West Yuma County School Dist. R-J-I*, 387 F.Supp. 552 (D. Colo., 1974), *aff'd*, 530 F.2d 1335 (10th Cir., 1976); *Washington v. Brantly*, 352 F.Supp. 559 (M.D. Fla., 1972).

Cases decided by district courts, prior to the instant decision of the Second Circuit, holding for the imposition of such liability, include *Adekalu v. New York City*, 431 F.Supp. 812 (S.D. N.Y., 1977); *Behan v. City of Dover*, 419 F.Supp. 562 (D. Del., 1976); *Demkowitz v. Endry*, 411 F.Supp. 1184 (S.D. Ohio, 1975); *Panzarella v. Boyle*, 406 F.Supp. 787 (D. R.I., 1975); and, *Dahl v. City of Palo Alto*, 372 F.Supp. 647 (N.D. Cal., 1974).

The City of West Haven respectfully submits that a writ of certiorari should issue to resolve this question which has resulted in a conflict in the circuits, and has been difficult of uniform resolution by many district courts.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE APPARENT INCONSISTENCY BETWEEN THE DECISION OF THE SECOND CIRCUIT AND THE DECISION OF THIS COURT IN MONELL V. DEPARTMENT OF SOCIAL SERVICES, AND THE RATIONALE OF BIVENS V. SIX UNKNOWN FEDERAL NARCOTICS AGENTS.

In *Monell v. Department of Social Services of the City of New York*, 98 S.Ct. 2018 (1978), the Court held that municipalities are no longer immune from liability under 42 U.S.C. §1983, and, to that extent, expressly overruled *Monroe v. Pape*, 365 U.S. 167 (1961).

The *Monell* decision was announced on June 6, 1978, the day following the announcement of the decision of the Second Circuit in the instant action.

The action of the Second Circuit, in this case, is based upon the rationale set forth in the *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

In *Bivens*, the Court was confronted with an anomaly when viewed against the fabric of legal remedies available to redress violations of constitutional rights which had previously been woven by Congress. No statutory cause of action was available to the plaintiff in that action.

In the face of the situation before it, in *Bivens*, the Court determined that it was both necessary and appropriate to afford a remedy, in money damages, against individual federal agents, in order to give full effect to the fourth amendment.

The Court also determined that no special factors were present to counsel hesitation in fashioning the remedy sought. No other remedial scheme had been provided by Congress.

In light of the Court's decision in *Monell*, petitioner urges the implying of a cause of action against a municipality for money damages is no longer necessary, or appropriate, since full relief can be obtained within the framework of 42 U.S.C. §1983.

Since 42 U.S.C. §1983 was, by its history, adopted pursuant to section five of the fourteenth amendment, and, since that statute is now interpreted as permitting money damage recoveries for constitutional violations by municipal actors against the municipality itself, the same, it is urged, should be accorded judicial deference as to the proper approach to give full effect to the amendment.

It is, therefore, respectfully submitted that, since no compelling need exists to sanction a cause of action, for money damages, against municipalities directly under the fourteenth amendment, it is inappropriate to imply such a cause of action, and remedy.

The Second Circuit, in its decision in this case, seemed to rely heavily on the fact that the municipality, itself, would not be subject to suit, or liability, unless the same were allowed directly under the fourteenth amendment.

Since that view has been dramatically altered by the Court's decision in *Monell*, it may well be that the Second Circuit would now decide the matter in a different manner.

The Court observed, in *Bivens, supra*, that no explicit congressional declaration existed to indicate

that injured parties were remitted to a remedy other than that permitted by the Court. Here, however, following the decision in *Monell*, such is no longer precisely the case.

Further, as noted by Chief Judge Lumbard, in *Bivens v. Six Named Unknown Agents of Federal Bureau of Narcotics*, 409 F.2d 718 (2nd Cir., 1969), federal courts should only imply a federal remedy for the enforcement of a constitutional right, when the absence of alternative remedies renders the constitutional provision less than fully effective.

Therefore, the City of West Haven respectfully submits that, to the extent that the Second Circuit sanctioned the implying of a cause of action directly from the fourteenth amendment, its action, in light of the Court's decision in *Monell*, is inconsistent with both *Monell* and *Bivens, supra*, and certiorari should issue to resolve this inconsistency.

III. CERTIORARI SHOULD BE GRANTED SINCE THE SECOND CIRCUIT DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. THE QUESTION OF WHETHER A CAUSE OF ACTION FOR MONEY DAMAGES AGAINST A MUNICIPALITY SHOULD BE IMPLIED, DIRECTLY FROM THE FOURTEENTH AMENDMENT, HAS NOT BEEN RESOLVED BY THIS COURT.

The question of whether a municipality may be held liable, for money damages, in an action directly under the fourteenth amendment, remains open and unresolved by this Court. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977).

As the Court noted in *Mt. Healthy*, that question was one of considerable importance, and should be resolved. That degree of importance which existed prior to the Court's decision in *Monell, supra*, would appear to remain at this time.

It remains likely, if not probable, that plaintiffs may wish, for whatever reason, to pursue actions, founded on a *Bivens* rationale, even though *Monell* has made municipalities amenable to suits, and imposition of money damage awards, under 42 U.S.C. §1983.

The Court suggested, in *Cort v. Ash*, 422 U.S. 66 (1975), in considering whether to imply a damage remedy from a regulatory statute which, itself, did not contain such a remedy, that such a remedy should be implied only when the enforcement scheme adopted by Congress is inadequate to attain its goals, and when a private right of action is necessary to cure the deficiency.

This rationale may well support the action of the Court in *Bivens*, but would not be appropriate support for implying a damage remedy from the fourteenth amendment, especially in light of the Court's recent holding in *Monell*.

Under the teaching of *Cort v. Ash*, one question is whether there is any indication of legislative intent, explicit or implicit, either to create, or to deny, the remedy. The legislative history of 42 U.S.C. §1983, as

discussed in *Monell*, clearly suggests the existence of an implicit legislative intent to permit such a remedy solely within the confines of that statute.

It also seems appropriate to suggest that any expansion of the remedy now afforded by 42 U.S.C. §1983 should be provided by the Congress.

As Messrs. Justice Burger, Black and Blackmun advised, in *Bivens, supra*, at pp. 411, 427 and 430, respectively, the more appropriate manner for dealing with this clearly troublesome issue is to exercise the separation of powers, and to leave the creation of any further remedy to the Congress.

Such an approach appears consistent with the provisions of section 5, fourteenth amendment, providing for congressional, rather than judicial, enforcement of the amendment.

The impact of section 5 in such situations was considered by the Court in *Ex Parte Virginia*, 100 U.S. 339 (1880), with particular attention to the comments of Mr. Justice Strong at page 345.

The Court has, in the not too distant past, given further consideration to the scope, and reach of section 5. In this regard, the comments of Mr. Justice Rhenquist, in a footnote in *National League of Cities v. Usery*, 426 U.S. 833 (1976), and the decision of the Court some four days later in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), seem significant. These decisions reflect an especial degree of deference to enactments under section 5. Such deference, it is urged, should apply to 42 U.S.C. §1983, similarly enacted.

In light of this status of the law, it is respectfully submitted that this Court should resolve this issue at this time.

B. THE STANDARD, LEVEL AND CHARACTER OF MUNICIPAL INVOLVEMENT NECESSARY TO GIVE RISE TO A CAUSE OF ACTION AGAINST THE MUNICIPALITY FOR MONEY DAMAGES, EITHER UNDER 42 U.S.C. § 1983, OR, IF ALLOWED, AS IMPLIED FROM THE FOURTEENTH AMENDMENT, IS UNSETTLED, AND SHOULD BE SETTLED BY THIS COURT.

In order for a municipality to either be subject to injunctive relief, or to be subject to liability in money damages, for infringement of constitutional rights, it has been held that the governmental entity must be a direct participant in the wrongdoing, or be directly blameworthy. *Monell v. Department of Social Services of the City of New York*, 98 S.Ct. 2018 (1978); *Rizzo v. Goode*, 423 U.S. 362 (1976); *Kostka v. Hogg*, 560 F.2d 37 (1st Cir., 1977); *McDonald v. State of Illinois*, 557 F.2d 596 (7th Cir.), *cert. denied*, 98 S.Ct. 508 (1977).

In *Monell*, the liability was founded upon action which implemented or executed a policy statement, ordinance, regulation or decision adopted by officials of the governmental entity, thus satisfying the direct participation concept.

In *McDonald v. State of Illinois, supra*, the Court indicated that it would not impose liability on a municipality in the absence of an official policy which required its employees to engage in the offending conduct. The decision in *Jamison v. McCurrie*, 565 F.2d 483 (7th Cir., 1977) is to the same effect.

The Eighth Circuit, in *Owen v. City of Independence, 560 F.2d 933 (8th Cir., 1977), cert. granted, vacated and*

remanded, 98 S.Ct. 3118 (1978), in a note, stated it did not imply by its decision in the case before it that a municipality would be held liable for money damages for police misconduct in the absence of proof that the policy making agencies of the city, or its officials, knowingly encouraged or tolerated such conduct.

While this expression is dicta, it nevertheless gave expression to yet another standard of the level and character of municipal involvement which is necessary for the imposition of liability. The standard there expressed appears to be less direct that that noted in the cases earlier cited.

In *Rizzo v. Goode, supra*, the question of failure of a city to provide adequately for the discipline of its police officers was at the heart of a claim for broad injunctive relief. The Court indicated that the inaction of the city in failing to supervise or discipline its police officers would not be viewed in the same fashion as would affirmative action or action in execution of stated policy. The requested relief was denied.

By way of illustration of the direct and affirmative forms of conduct which the Court would find actionable, as against a municipality, specific reference was made in *Rizzo, supra* to *Allee v. Medrano*, 416 U.S. 802 (1974) and *Hague v. CIO*, 370 U.S. 496 (1938).

A similar view is expressed in *Kostka v. Hogg, Crosley v. Davis*, and *Gresham v. City of Chicago, supra*.

The First Circuit, in *Kostka v. Hogg, supra*, adopted the *Rizzo* concept and standard, and noted that direct municipal involvement would be required before the imposition of liability could be considered. That Court also adopted the *Rizzo* reasoning that no federal

constitutional duty existed compelling a police chief to take positive action to discipline police officers to reduce the incidence of unconstitutional conduct by police officers.

Mr. Turpin bases his claims in this action on an allegation that the governing board of the Police Department failed to discipline a police officer. It is claimed that, as a result of such inaction, other police officers later violated his constitutional rights.

Based upon such claims, the Second Circuit held that a municipality may be held liable in money damages where the actions of its employees have been authorized, sanctioned or ratified by municipal officials, or policy making bodies. The Court regarded that standard as defining direct municipal responsibility for the allegedly unconstitutional acts of its employees.

Insight into the views of the Second Circuit, in defining the standard of municipal action which might subject it to liability, is found in its statement that the inaction of police officials in failing to discipline a single police officer, as a result of a single event, may amount to a *de facto* departmental policy.

This measurement of the degree, or character, of municipal involvement necessary to subject it to liability, including a substantial inference from the limited facts alleged, seems unwarranted, and is not in keeping with the standards described in *Rizzo* where the Court considered patterns of activity involving large numbers of incidents.

It is submitted that the assertions against the City might alternatively be viewed as allegations of negligence. It is claimed that the City had a duty to

discipline its police officers to prevent their unconstitutional conduct, and, that duty was breached, on one occasion. The breach then proximately resulted in the complained-of action by the individual officers.

Such an analysis must include the unstated assertion that the municipal agency knew, or should have known, that its failure to discipline one individual police officer might be perceived by other individual officers as a sanction for violating the constitutional rights of the citizenry.

To the extent that such a standard is claimed, the same appears to fall short of the standards announced in *Rizzo* and *Monell, supra.*

The City of West Haven respectfully submits that the standard applied by the Second Circuit to measure the alleged involvement of the municipality in the complained-of conduct is inconsistent with the prior expressions of this Court in *Monell* and *Rizzo*, and thus the decision should be reviewed by this Court.

Moreover, it is respectfully submitted that the standard is unsettled, and should be further defined by this Court.

CONCLUSION

For the above reasons, it is respectfully requested that this Honorable Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

PAUL A. SCHOLDER
Attorney for Petitioner

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

****

Thomas Turpin, *
Plaintiff *
*
vs. Civil Action
* No. N-75-181
*
Joseph Mailet, Et Al., *
Defendants *

****

RULING ON MOTION TO DISMISS

This is a civil rights action for damages arising from an alleged false arrest in West Haven, Connecticut, the arrest assertedly motivated by animosity resulting from a successful prior suit by plaintiff against a West Haven police officer. The complaint essentially joins recognized federal claims against individual policemen under 42 U.S.C. §1983 and its jurisdictional counterpart, 28 U.S.C. §1343, see *Monroe v. Pape*, 365 U.S. 167 (1961), with a purported claim against the municipality made directly under the Constitution, cf. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); jurisdiction to entertain the latter "implied" right of action is claimed under the general federal question grant 28 U.S.C. §1331, cf. *Bell v. Hood*, 327 U.S. 678 (1946). The defendant city has moved to dismiss.

It is of course settled that Congress did not intend to subject municipalities to suit under §1983 for alleged violations of civil rights. *Monroe v. Pape, supra* at 187-192; see also *City of Kenosha v. Bruno*, 412 U.S. 507, 511-513 (1973); cf. *Moor v. County of Alameda*, 411 U.S. 693, 698-710 (1973). The proposition that federal courts may and should nevertheless independently recognize or create a damage remedy against a municipality for alleged denial of constitutional rights is not yet settled, having been treated as an open question in this Circuit, see *Fine v. City of New York*, 529 F.2d 70, 76 (2 Cir. 1975), and most recently by the Supreme Court, see *Mt. Healthy City School District Board of Education v. Doyle*, 45 U.S.L.W. 4079, 4080 (1977). That "extremely important question", *id.* at 4080, would seem at least of sufficient substance to warrant threshold assumption of §1331 jurisdiction to consider its merits, see, e.g., *Perzanowski v. Salvio*, 369 F.Supp. 223, 229 (D. Conn. 1974), cf. *City of Kenosha v. Bruno, supra*, at 514, *Bell v. Hood, supra* at 682-685.

The claim of municipal liability is made by analogy to the holding in *Bivens, supra*, in which the Supreme Court sanctioned judicial resort to a damage remedy "implied" directly under the Constitution, there affording a right to relief against individual federal law enforcement officers equivalent to that traditionally available under §1983 against state and local officers for such abuses of authority as illegal search and arrest, the Court having in those circumstances discerned "no special factors couselling hesitation in the absence of affirmative action by Congress", *id.* at 396. While the complaint now before this Court is to be read generously, see *Scheuer v. Rhodes*, 416 U.S. 232, 236

(1974), the question is not so much whether plaintiff could conceivably prove facts calling into play an established right of action, as whether the different circumstances here depicted render appropriate this Court's fashioning a new suit right. As in similar prior motion proceedings in this district, moreover, for present purposes "it is unneccessary to determine whether the *Bivens* rationale should ever be extended to imply a remedy against a municipality for damages arising from allegedly unconstitutional action", *Gifford v. Rodriguez*, Civil No. N-76-157 (D. Conn. Jan. 11, 1977), but is instead "sufficient to note that, under the circumstances of this case, municipal liability is inappropriate", *id.*

In writing for a divided panel of the Court of Appeals for this Circuit which initially recognized just such a "direct" claim for damages for a town's alleged violation of due process rights in attempting judicial enforcement of an invalid zoning ordinance, Judge Smith viewed *Bivens* as "sweeping approbation of constitutionally-based causes of action," *Brault v. Town of Milton*, 527 F.2d 730, 734 (2 Cir. 1975). It is fair to state, however, that the courts have not reached unanimous agreement concerning *Bivens'* proper scope, see Note, "Damage Remedies Against Municipalities For Constitutional Violations," 89 Harv. L. Rev. 922, 927-929 (1976). Indeed, in *Brault* itself, on rehearing *en banc* the Court of Appeals found no Fourteenth Amendment violation stated on the complaint's face in any event, and expressly declined to resolve plaintiffs' disputed contention that "regardless of §1983, their damage suit must be upheld on the ground that it is derived directly from the Fourteenth

Amendment," *id.* at 738. As remarked above, the issue has yet to be authoritatively decided, see *Mt. Healthy, supra, Fine v. City of New York, supra.*

Absent controlling general endorsement of imposition of municipal liability directly under the Constitution, it is prudent to bear in mind that plaintiff requests *judicial creation* of a remedy. In an era of increasing numbers of civil rights enactments following the Supreme Court's definitive interpretation of the traditional Civil Rights Act as precluding municipal liability, *Monroe v. Pape, supra*, the failure or refusal of Congress to expand §1983's settled reach can hardly be ignored, cf. *Perzanowski v. Salvio, supra* at 230, compare, e.g., Note, "Damage Remedies," *supra* at 935-951, with Comment, "Implying a Damage Remedy Against Municipalities Directly Under the Fourteenth Amendment: Congressional Action as an Obstacle to Extension of the *Bivens* Doctrine," 36 Maryland L. Rev. 123, 145-152 (1976). If ever proper against that background, the Court's undertaking independently to fashion a new federal right of action against a local governmental entity must surely be based at a minimum on a concrete showing of genuine need for that specific remedy.

The civil rights suit obviously provides access to the courts to permit vindication of constitutional rights or redress for their denial, and in that context it certainly seems anomalous to entertain a claim against one concededly not even a wrongdoer. This Court has accordingly held consistently that

> "the mere principle of *respondeat superior* is as inappropriate a foundation for implying a novel federal right of action for damages against the municipality as for expanding Civil Rights Act liability to individual superior officers without personal responsibility for the underlying wrong, cf., e.g., *Johnson v. Glick*, 481 F.2d 1028, 1034 (2 Cir.), *cert. denied sub nom Employee-Officer John v. Johnson*, 414 U.S. 1033 (1973)."

Caputo v. City of Bridgeport, Civil No. N-74-203 (D. Conn. Dec. 16, 1974). See also *Gifford v. Rodriguez, supra*, observing that the Fourteenth Amendment simply "does not incorporate common law notions of *respondeat superior* to make local treasuries available for the unconstitutional act of every municipal employee." In *Brault*, by contrast, the town was directly involved in the immediate purported wrong complained of, its "obtaining and maintaining . . . [an] injunction . . . under a zoning ordinance that they [sic] knew, or should have known, to be invalid," *id.* at 733, see also *Dahl v. City of Palo Alto*, 372 F.Supp. 647 (N.D. Cal. 1974) (rezoning). Although a municipal corporation must always act through its agents, strictly speaking, municipal participation in or responsibility for the wrong is at least perhaps a more comprehensible notion in the latter type of case than when the link is solely employment of a policeman accused of misconduct.

In the present suit, the complaint alleged in part that plaintiff was subjected to a false arrest on disorderly conduct charges by two West Haven police officers "attempting to punish the plaintiff for having brought a civil action against their brother Officer," the incident now at issue having occurred two or three months after plaintiff had secured a damage award in an earlier civil rights action against another West Haven policeman.

Apparently in the interim, the city's board of police commissioners had allegedly discussed the prior case's outcome and "decided to take no action against [that] Officer. . .[he] had been blameless," so that the city "took no action of a disciplinary nature." While contending in general terms that the city has "employed a police force which has denied . . . [constitutional] rights to the plaintiff, and has encouraged and supported the members of said police force to deny the constitutional and civil rights of the plaintiff," the complaint's specifications are in relevant part that

> "The failure of the City of West Haven to discipline [the] Officer . . . even following the prosecution of a successful civil suit against him encouraged police officers of the City . . . in the belief that they could violate the constitutional and civil rights of citizens with impunity, and particularly the constitutional and civil rights of the plaintiff . . . The City . . . did nothing to reduce the animosity of its police officers against the plaintiff, and by failing to discipline [this] Officer . . . encouraged police officers to give vent to their feelings of animus and to take action against the plaintiff."

This pleading itself clearly indicates that the city did not *act* to deny any constitutional right of the plaintiff. In that regard, it is noteworthy that a Seventh Circuit ruling upholding a similar complaint against the City of Chicago and municipal officials with authority over the police department for consistent failure to investigate police misconduct and to take proper disciplinary measures, "a course of conduct that condones, and in effect encourages such abusive misconduct," *Calvin v.*

Conlisk, 520 F.2d 1, 3 (7 Cir. 1975), was recently "vacated, and [the] case remanded for further consideration in light of *Rizzo v. Goode*, 423 U.S. 362 (1976)," *Conlisk v. Calvin*, 424 U.S. 902-903 (1976). In *Rizzo*, involving a claimed pattern of police misconduct in Philadelphia, the lower court's grant of equitable relief under §1983 directing supervisory city officials to formulate improved procedures for dealing with citizen complaints was held unwarranted on the ground, *inter alia*, that "the responsible authorities had played no affirmative part in depriving any members of the . . . [plaintiff] classes of any constitutional rights," *id.* at 377 The Supreme Court's refusal in the circumstances to equate a supervisory officer's "*failure* to act" with "active conduct," *id.* at 376 (emphasis original), would seem to have extended beyond a mere weighing of the appropriateness of the particular relief afforded, to the conclusion that the defendant officials' inaction did not there amount to a violation of constitutional rights, see *id.* at 377. Such a conclusion is of potentially equal significance for the §1983 claim against municipal employees in command positions, the §1331 claim for injunctive relief against a city actually entertained in *Calvin v. Conlisk, supra* at 8-10, and the purported §1331 damage claim here advanced.

The distinction between omission and commission can be elusive, however, and an invariably rigid conceptual analysis would be improvident. The traditional Civil Rights Act, after all, was prompted by a state of affairs which could be characterized as "the failure of certain States to enforce the laws with an equal hand," *Monroe v. Pape*, *supra*, at 174. But a

denial of right by culpable failure to act is perhaps more easily and naturally perceived in the case of the individual official within §1983's established reach; the law enforcement officer who deliberately turns a blind eye to the kidnapping of his prisoner by self-appointed vigilantes, for example, can hardly claim that he "did" nothing wrong. The analogy to a town government's inertia is less compelling, and any sensible attribution of responsibility in such a diffuse manner conceivably would even call for a more demanding test for finding "town" liability than for assigning responsibility to individual officials of higher and lower stations. As a practical matter, absent some affirmative policy-making step the municipal liability claim is likely to rely on the doctrine of *respondeat superior* under one guise or another. In any event, identifying a difference between inaction and improper action is no artificial semantic exercise in the instant lawsuit; there is here no genuinely substantial contention of local government participation in wrongdoing.

Unlike the situation in *Bivens, supra* at 390-397, plaintiff has not been denied a right of suit against those persons directly accused of violating his fundamental civil rights. If at all pertinent, additional arguments that recognition of an alternative or supplemental federal remedy against the individual defendants' municipal employer is essential for increased deterrence, and collection of any judgment, are speculative in this instance and may in many cases rest on unexamined assumptions, see Comment, "Implying A Damage Remedy," *supra*, at 142-143. Ironically enough in this context, the present complaint actually alleges that the "damages for which

[the] Officer . . . was found liable [in the prior suit] were in fact paid by the insurance carrier for the City of West Haven"; nor has plaintiff attempted to demonstrate that these individual defendants are judgment proof, compare *Moor v. County of Alameda, supra*, n. 10 at 700. Even assuming that the city does not "stand behind" the defendant officers financially in some manner, compare, e.g., *Gifford v. Rodriguez, supra*, with *Gonzalez v. Doe*, 476 F.2d 680, 686 (2 Cir. 1973), the Court is not convinced that the novel federal cause of action sought may be properly "implied" in this case.

In short, plaintiff has no actionable claim against the municipality under §1983, and presents no compelling reason for judicial recognition of such a claim directly under the Constitution. The complaint's additional cryptic reference to 42 U.S.C. §1988, the limited civil rights "borrowing" provision, gives rise to no substantive federal claim, see *Moor v. County of Alameda, supra* at 698-710. Plaintiff also does allude to unspecified pendent "causes of action under state law sounding in tort," possibly including a purported claim for municipal indemnification, cf. Conn. Gen. Stat. §7-465, but this Court is not empowered to exercise pendent jurisdiction over any state law claim against the defendant city with no federal claim against it remaining in the case, *Aldinger v. Howard*, 427 U.S. 1 (1976).

The defendant City of West Haven's pending motion to dismiss is accordingly granted. The complaint is hereby dismissed as against that defendant, the purported federal claims for failure to state a claim upon which relief can be granted, Rule 12(b)(6), Fed. R. Civ. P., and any intended state law claims for lack of

federal jurisdiction, Rule 12(b)(1), Fed. R. Civ. P., without prejudice to assertion of the latter in state court.

Dated at New Haven, Connecticut this 9th day of May, 1977.

United States Magistrate

SO ORDERED

United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

THOMAS TURPIN	:	
v.	:	CIVIL NO. N-75-181
JOSEPH MAILET and JOHN DOE, individually and as police officers of the Police Department of the Town of West Haven and TOWN OF WEST HAVEN	:	

MAY 17 10 1[illegible] '77
U.S. DISTRICT COURT
NEW HAVEN

PARTIAL JUDGMENT

This cause having come on for consideration on defendant's (Town of West Haven) motion to dismiss before the Honorable Arthur H. Latimer, United States Magistrate, and said Magistrate having filed a Ruling on Motion to Dismiss (approved by the Court, Newman, J.) on May 13, 1977, granting said motion,

IT IS ORDERED and ADJUDGED that judgment be and is hereby entered in favor of the defendant TOWN OF WEST HAVEN, only, dismissing the complaint for failure to state a claim upon which relief can be granted, Rule 12(b)(6), Fed. R. Civ. P., and any intended state law claims for lack of federal jurisdiction, Rule 12(b)(1), Fed. R. Civ. P., without prejudice to assertion of the latter in state court.

Dated at New Haven, Connecticut, this 17th day of May, 1977.

SYLVESTER A. MARKOWSKI
CLERK,
UNITED STATES DISTRICT COURT

BY: _____
Deputy-In-Charge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FILED
AUG 2 8 25 AM '77
U.S. DISTRICT COURT
NEW HAVEN, CONN.

THOMAS TURPIN :

V. : CIVIL NO. N-75-181

JOSEPH MAILET, ET AL :

RULING ON PLAINTIFF'S MOTION FOR RULE 54(b) CERTIFICATION

Plaintiff instituted this suit against the Town of West Haven and individual police officers of the Town seeking damages for an arrest alleged to be false and motivated by a prior successful civil rights suit. The claim against the Town was founded directly on the Fourteenth Amendment with jurisdiction based on 28 U.S.C. §1331. In a carefully reasoned opinion, which fully reckoned with the difficulties of the issues presented, Magistrate Latimer recommended that the motion of the Town to dismiss be granted, and this Court adopted that recommendation. The plaintiff has now moved for a direction that judgment be entered upon the dismissed claim, pursuant to Fed. R. Civ. P. 54(b). Magistrate Latimer has recommended against the Rule 54(b) certification, but this Court concludes that it is entirely appropriate in the circumstances of this case.

The Magistrate based his current recommendation in part on the assumption that the claim against the

Town may never be established since, in his view, a finding of liability on the part of the individual officers is a prerequisite to municipal liability. While it is not necessary to adjudicate that question authoritatively on this motion, the proposition is by no means certain and should not preclude Rule 54(b) certification. Since the liability of the Town in cases as this is not alleged to be based on *respondeat superior* but rather on the direct responsibility of the Town, it is at least plausible to argue that the claim against the town could succeed even if the officers were exonerated because each had established his good faith defense.

The issue of whether this complaint states a cause of action against the Town is an important issue that deserves appellate consideration. There are approximately thirty lawsuits pending in this District in which similar claims founded on the Fourteenth Amendment have been brought against municipalities for their alleged responsibility for wrongful police action. Whether the municipality continues as a defendant during the course of these lawsuits has an important bearing on their conduct, on trial strategy, and on settlement possibilties. Moreover, the claim alleged in this suit, while deemed by the Magistrate and this Court to be insufficient to state a valid cause of action, probably comes the closest of all these suits to the line established by the decision in this case. Thus a decision upholding the dismissal will provide authoritative guidance for the other cases; conversely, an appellate decision reinstating the claim in this case would presumably provide sufficient elucidation of the appropriate standard to be of material assistance in determining which of the other claims against municipalities should proceed to trial.

Thus, the entry of judgment in favor of West Haven in this case at this time will significantly contribute to the expeditious conduct of civil litigation in this District as well as provide guidance for the litigating posture of numerous municipalities currently defendants in other pending suits. Not only is there no reason for delay in the entry of judgment, there is substantial reason for not delaying. Accordingly, the Court finds for the reasons stated that there is no just reason for delay in the entry of judgment and expressly directs the Clerk to enter judgment dismissing the plaintiff's claim against the Town of West Haven.

Dated at Hartford, Connecticut, this ____ day of August, 1977.

Jon O. Newman
UNITED STATES DISTRICT JUDGE

United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FILED
AUG 3 3 51 PM '7
U.S. DISTRICT COURT
NEW HAVEN, CONN.

THOMAS TURPIN :

v. : CIVIL NO. N-75-181

JOSEPH MAILET, ET AL :

JUDGMENT AS TO DEFENDANT TOWN OF WEST HAVEN

This cause having come on for consideration on plaintiff's motion to Amend Partial Judgment entered on May 17, 1977, before the Court (Newman, J.) and a Ruling on Plaintiff's Motion for Rule 54(b) Certification having been filed by the Court on August 2, 1977, having determined that there is no just reason for delay and having directed the Clerk to enter judgment, dismissing the plaintiff's claim against the Town of West Haven.

It is ORDERED and ADJUDGED that judgment be and is hereby entered in favor of the defendant TOWN OF WEST HAVEN only dismissing this action, with its costs.

Dated at New Haven, Connecticut this 3rd day of August, 1977.

SYLVESTER A. MARKOWSKI
Clerk, United States District Court

By: _____
Deputy In Charge

APPENDIX E

The Opinion of the Court of Appeals in Thomas Turpin v. City of West Haven has not been filmed and can be found at 46 L.W. 2658.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the _____ day of _____ one thousand nine hundred and

Present:

HON. IRVING R. KAUFMAN, Chief Judge
HON. WILFRED FEINBERG
HON. WALTER R. MANSFIELD
HON. WILLIAM H. MULLIGAN
HON. JAMES L. OAKES
HON. WILLIAM H. TIMBERS
HON. MURRAY I. GURFEIN
HON. ELLSWORTH A. VAN GRAAFEILAND
HON. THOMAS J. MESKILL

Circuit Judges,

THOMAS TURPIN,

Plaintiff-Appellant,

v.

JOSEPH MAILET and JOHN DOE, individually and as Police Officers of the Police Department of the Town of West Haven,

Defendants-Appellees.

UNITED STATES COURT OF APPEALS
FILED
JUN 5 1978
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

77-7345

Appeal from the United States District Court for the District of Connecticut

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Judgment of said District Court be and it hereby is reversed and the action be and it hereby is remanded to said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellees.

A. DANIEL FUSARO,
Clerk

By /s/ Arthur Heller
Deputy Clerk

Supreme Court, U. S.
FILED
SEP 29 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-370

CITY OF WEST HAVEN,

Petitioner,

v.

THOMAS TURPIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

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IN THE

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v.

THOMAS TURPIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

Pursuant to Rule 24(5) of the Rules of this Court, petitioner, City of West Haven, submits this supplemental brief to bring to the attention of the Court cases and other matter not available to counsel for petitioner at the time of the filing of the Petition for a Writ of Certiorari.

The opinion of the United States Court of Appeals in this action is now reported as *Turpin v. Mailet,* 579 F.2d 152 (2d Cir. 1978).

A principal question raised by the Petition is whether municipalities are subject to liability for money damages in an action implied directly from the fourteenth amendment to the United States Constitution for constitutional violations allegedly committed by their employees.

The initial reason advanced for allowance of the writ is that a conflict exists among the several circuits with respect to whether such a cause of action may be implied of the rationale expressed in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Since filing the Petition, a decision has been published in *Molina v. Richardson*, 578 F.2d 846 (9th Cir. 1978).

In that action, which has factual parallels to the instant action, the Ninth Circuit declined to sanction such a cause of action.

The *Molina* court addressed matters raised in points II and III(A) of the Petition, concluding that it is neither necessary, nor appropriate, to imply the constitutional cause of action, in light of the adequacy of the remedy now available under 42 U.S.C. §1983.

This decision is of particular interest, since it appears to be the first published decision of any Court of Appeals, subsequent to the decision by the Court in *Monell v. Department of Social Services of the City of New York*, 98 S.Ct. 2018 (1978), dealing with actions under 42 U.S.C. §1983, and causes of action asserted directly under the fourteenth amendment.

Insofar as the decision in *Molina* declined to sanction a fourteenth amendment cause of action, it is in conflict with the Second Circuit.

The extent of the conflict among the cirucits, prior to the decision in *Monell*, is reflected in Comment, *Municipal Liability for Constitutional Violations: Can You Fight City Hall? A Survey of the Circuits*, 16 Duq. L. Rev. 373 (1977-78), which was indexed subsequent to filing the Petition. While this survey does not reflect the most recent judicial activity on this topic, including neither the decision of the Second Circuit in the instant case, nor the recent actions of the Court in *Monell, supra, Mahone v. Waddle*, 564 F.2d 1018 (3d Cir. 1977), *cert. denied*, 98 S.Ct. 3122 (1978), *McDonald v. State of Illinois*, 557 F.2d 596 (7th Cir.), *cert. denied*, 98 S.Ct. 508 (1977), and *Owen v. City of Independence*, 560 F.2d 925 (8th Cir. 1977), *cert. granted, vacated and remanded*, 98 S.Ct. 3118 (1978), it does provide a concise examination of the divergent views held by the several circuits.

The survey underscores the need for a decision by the Court in order to provide a uniform statement of the law on this issue, as applied to municipalities throughout the United States.

The Petition, at point III(B), also seeks review to consider, and further define, the standard, level and character of municipal involvement necessary to give rise to the cause of action for money damages against a municipality, either under 42 U.S.C. §1983, or, if allowed, as implied from the fourteenth amendment, pursuant to the invitation contained in both the majority, and concurring opinions in *Monell.*

Since filing the Petition, a decision has been published in *Reimer v. Short*, 578 F.2d 621 (5th Cir. 1978), in which the Fifth Circuit comments briefly on this topic, indicating that the policies of the municipality must cause the constitutional violation to be actionable,

and concluding that vicarious liability itself is insufficient as a basis for such liability. Clearly, further expression by the Court is required to settle this issue.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition, it is respectfully requested that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

PAUL A. SCHOLDER

Attorney for Petitioner.